

NEW JERSEY COMMERCE & ECONOMIC GROWTH COMMISSION

Women-Owned and Minority-owned Businesses

Proposed Readoption With Amendments: N.J.A.C. 12A:11-1.1 et seq.

Authorized By: New Jersey Commerce & Economic Growth Commission

William D. Watley, CEO and Secretary

Authority: N.J.S.A. 52:27C-71 (q); -52:27C-73(a), (f) and (h); N.J.S.A. 52:27H-21.24 and -52:14B-1 et seq., N.J.S.A. 10:5-36(k) and (o), 52:18A-30(d), 52:25-1 et. seq., 52:27H-6(f), 52:32-17 et. seq., 52:34-6 et. seq., 52:34-12 and 13, and Executive Order No. 84(1993).

Calendar Reference: See summary below for explanation of the exception to the calendar requirement.

Proposal Number: PRN 2003-153

Submit comments by July 4, 2003 to:

Joseph T. Grossi, Director

Office of Business Services

New Jersey Commerce & Economic Growth Commission

20 West State Street

PO Box 820

Trenton, NJ 08625

The agency proposal follows:

### Summary

The New Jersey Commerce & Economic Growth Commission (Commission) is proposing to readopt N.J.A.C. 12A:11-1.1 et seq., which deals with the Certification of Women-Owned and Minority-owned Businesses. The New Jersey Commerce & Economic Growth Commission has exclusive authority to certify businesses as minority or women -owned for purposes of bidding on state contracts. (See N.J.S.A. 52:27H-21.19).

The New Jersey Commerce & Economic Growth Commission has reviewed these rules, including the following amendments, and has determined them to be necessary, reasonable, and proper for the purpose for which they were originally promulgated. The proposed amendments are technical in nature in that they replace references to the New Jersey Department of Commerce and Economic Development and the position of Commissioner with references to the New Jersey Commerce and Economic Growth Commission (Commerce Commission) and the position of Chief Executive Officer and Secretary (Secretary). The Department of Commerce and Economic Development,

abolished by statute in 1998, was replaced by the Commerce and Economic Growth Commission. These administrative rules are promulgated pursuant to the Commission's authority under N.J.S.A. 52:27C-71 (q); -52:27C-73(a), (f) and (h); N.J.S.A. 52:27H-21.24 and -52:14B-1 et seq. The proposed technical amendments in N.J.A.C. 10A-1.1(a)-(c); 1.2; 1.4 (a), (b); 1.8(b), (d); 1.9(a)1,2,(b)1,2, (c)1,2,3,5; 1.10(a)(b)(c), 1.13(a),(b) 1,2 and 1.14 delete the word "Commissioner" and replace it with "Chief Executive Officer and Secretary" and delete the words "Department of Commerce and Economic Development" and replace it with "Commerce and Economic Growth Commission" to accurately reflect the statutory change from the Department of Commerce and Economic Development to the Commerce and Economic Growth Commission. Section 1.3(b)(1)(ii) was modified to remove the word actually. The deletion of the word actually will provide more commercial viability for businesses certified under this program. The amendments in section 1.11(a) changes the current requirement that businesses submit a Uniform Certification Application from every five years to every three years. This amendment comports with N.J.S.A. 52:27H-21.19 which requires the Commerce Commission to monitor the status of certified businesses to insure continued compliance with the criteria for certification and control of certified businesses by the appropriate persons. These administrative rules are promulgated pursuant to the Commission's authority under N.J.S.A. 52:27C-71 (q); -52:27C-73(a), (f) and (h); N.J.S.A. 52:27H-21.24 and -52:14B-1 et seq. The contracting agencies provided in section 1.2(a) have been updated to reflect the current agency/institution names. The Commerce Commission's

address was changed from P.O. Box 835 to 820 in section 1.1(c). Changes in section 1.14(a) reflect the recent changes in the "Right to Know" law under the "Open Public Records Act", N.J.S.A. 47:1A-1 et seq.

Chapter 11, Women-Owned and Minority-Owned Businesses, was adopted as R.1987 d.376, effective September 21, 1987. See: 19 N.J.R. 1176(a), 19 N.J.R. 1739(a).

The Executive Order No. 66(1978) expiration date of Chapter, Women-owned and Minority-owned Businesses, was extended by gubernatorial directive from September 21, 1992 to April 30, 1993. See: 24 N.J.R. 4333(a)

Pursuant to Executive Order No. 66(1978), Chapter 11, Women-owned and Minority-owned Businesses, was readopted as R.1993 d.237, effective April 30, 1993. See: 25 N.J.R. 1056(a), 25 N.J.R. 1753(a), 25 N.J.R. 2484(a).

Pursuant to Executive Order No. 66(1978), Chapter 11, Women-owned and Minority-owned Businesses, was readopted as R.1998 d.238, effective April 22, 1998. See: 30 N.J.R. 968(a) and 1835(a). The rule will expire on October 19, 2003

Following is a summary of the provisions of each subchapter of the chapter proposed for readoption.

Provisions regarding application and scope -- C12A:11-1.1; words and terms used in the rules -- N.J.A.C. 12A:11-1.2; standards of certification for minority businesses and women businesses -- N.J.A.C. 12A:11-1.3; certification procedures for minority businesses and women businesses -- N.J.A.C. 12A:11-1.4; acceptance as a certified minority business or women business -- N.J.A.C. 12A:11-1.5; time for application to be certified as a minority and/or women business -- N.J.A.C. 12A:11-1.6; right of withdrawal -- N.J.A.C. 12A:11-1.7; denial of certification as a minority or women business -- N.J.A.C. 12A:11-1.8; procedure for challenging a business certified as a minority business and/or women business -- N.J.A.C. 12A:11-1.9; obligations to provide information and penalties for failure to provide complete and accurate information -- N.J.A.C. 12A:11-1.10; period and terms of certification -- N.J.A.C. 12A:11-1.11; fee for certification -- N.J.A.C. 12A:11-1.12; certification reciprocity -- N.J.A.C. 12A:11-1.13; and information confidentiality -- N.J.A.C. 12A:11-1.14.

### Social Impact

The Uniform Certification Act, at N.J.S.A. 52:27H-21.17c, acknowledges the role of government at the national, State and local levels in encouraging the development of businesses owned by minorities and women. The unified procedure for the certification of such businesses will facilitate their participation in various State programs, eliminate a duplication of effort on the part of all concerned, and improve the efficiency of the businesses. The certification procedure is centralized through these rules in the Department of Commerce and Economic Development. The integrity of the certification program is also

protected by the various measures against fraud and misrepresentation set forth in the rules.

### Economic Impact

The Unified Certification Act and these rules have impacted generally on the New Jersey economy by assisting in the development of minority and women-owned businesses.

The Department bears the cost of administering the certification program through its annual budget. Where the Department considers a visit to an applicant's business site is necessary, it may be reimbursed by the business seeking certification for the costs of the visit, including, but not limited to, employee travel costs, if the business is outside a 150 mile radius from Trenton, and the employee's out of pocket per diem expenses.

Businesses affected under the Act and these rules will incur some cost in meeting the demands for specific information imposed under the certification and certification renewal processes. In addition, business site visit costs, when necessary, are to be reimbursed by the applicant, as detailed in the preceding paragraph. However, certified businesses will realize savings in that they will be certified by one agency, and as such will not be duplicating efforts and associated costs of being certified by numerous State agencies.

It is anticipated that such firms will also realize increased procurement opportunities by being eligible to participate in affirmative action goal programs which restrict involvement to certified businesses. Thus chances of being a successful low bidder are increased by limiting the competition to only certified bidders.

### Jobs Impact

These rules establish procedures for the required participation of every agency and department of the State of New Jersey that is authorized to award contracts. The rules proposed for readoption and amendments will result in the retention and creation of jobs. As a result of small businesses, women and minority-owned businesses being awarded State construction and construction-related contracts, which will enable them to grow their businesses and maintain and expand their employment.

### Federal Standards Statement

There are non standards or requirements applicable to the rule proposed for readoption with amendments.

### Agriculture Industry Impact

The Commission anticipates that the proposed amendments will have no impact on the agriculture industry.

### Regulatory Flexibility Statement

The rules proposed for readoption with amendments impose compliance requirements on businesses seeking certification as minority and women-owned businesses. While exact numbers are not available, the large majority of such businesses in New Jersey meet the definition of small business under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Businesses applying for certification are required to provide the application information set forth in N.J.A.C. 12A:11-1.4, incurring the attendant

administrative costs for doing so. No professional services need be employed to provide this information. In addition, the expenses of a site visit by a Department employee, if necessary, have to be borne by applicants beyond a 150- mile radius of Trenton. Should an application be denied, appeal requirements are established under N.J.A.C. 12A:11-1.8 and 1.9.

Once certified, a business is obligated to report any changed ownership circumstances immediately, and any material change within 20 days, to the Department, and to make an annual report to the Department to verify that the ownership and control of the business upon which certification was based has not changed.

Certain businesses, as specified in N.J.A.C. 12A:11-1.9(a), are entitled to challenge the qualifications of any certified business. The challenge must be in writing, and the challenger bears the burden of proof in the hearing on the challenge. Many of the businesses entitled to challenge qualify as small businesses under the Regulatory Flexibility Act. Such businesses would have to incur the administrative costs of the written challenge, and the cost of proving the challenge at hearing. Professional services are not required for either.

The proposed amendments to the expired rules impose on applicants the additional requirements of including personal financial statements and tax returns of all the principals, stockholders and directors, and prohibit reapplication for certification for one year following the date of denial of an application. Administrative costs are involved in preparing and filing the statements, but no professional services are necessary.

The Department considers these rules to contain the minimum informational requirements necessary to permit a thorough and fair evaluation of an applicant's qualifications for certification, and to ensure entitlement to continued certification. Much of the application information required is mandated



under the Uniform Certification Act. By unifying the certification process under one agency, the Act and these rules work to businesses' economic benefit by necessitating only one certification for the various State programs. Certified businesses benefit by their entitlement to participate in such programs. Given the need for these requirements, and the benefits occurring to successful applicants, no lesser requirements or exemptions are provided for small businesses.

### Smart Growth Impact

Any impact with respect to the achievement of smart growth and the implementation of the State Development and Redevelopment Plan would be a result of the participation of Small Businesses, Female Businesses and Minority Businesses on projects within designated smart growth areas.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 12A:11.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

#### 12A:11-1.1 Application and scope

(a) The rules in this subchapter are promulgated by the [Department of Commerce and Economic Development]**Commerce and Economic Growth Commission** to implement the Unified Certification Act, P.L. 1986, c.195. The

Act establishes a unified procedure for the certification of women-owned and minority-owned firms, which firms are seeking to qualify for certain government programs and firms doing business with casino licensees pursuant to P.L. 1987, c.137.

(b) The Act requires the [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission** to establish and implement standards and procedures for certifying women-owned and minority-owned businesses for certain government programs and firms doing business with casino licensees pursuant to P.L. 1987, c.137.

(c) Applications and questions regarding certification of women-owned and minority-owned businesses should be addressed to:

N.J. [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission**

Contracting Opportunity and Certification Office

PO Box [835] **820**

20 West State Street

(d) No Change

12A:11-1.2 Definitions

The words and terms used in this subchapter shall have the following meanings unless the context clearly indicates otherwise:

"Certification" means a minority-owned or women-owned business enterprise has been authenticated as being at least 51 percent independently owned and managerially controlled and operationally controlled either by minorities or females for participation in State programs requiring certification, as judged and determined by the Contracting Opportunity and Certification Office of the [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission.**

"[Commissioner] **Secretary**" means the [Commissioner of the Department of Commerce and Economic Development] **Chief Executive Officer and Secretary** of the [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission.**

"Contracting Opportunity and Certification Office" means the office in the [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission** which is given sole authority over certification of minority and women businesses for State programs or which may provide certification for Federally mandated programs.

"[Department] **Commission**" means the [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission**.

"Director" means the Director of the Division of Development for Small Businesses and Women and Minority Businesses in the [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission**.

"Division" means the Division of Development for Small Businesses and Women and Minority Businesses in the [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission**.

12A:11-1.3 Standards of certification for minority businesses and women businesses

(a)-(b)(1)(i) No Change

(ii.) Only businesses performing a commercially useful function may be

certified under this program. An MBE or WBE is considered to perform a commercially useful function when it carries out its responsibilities by [actually] performing, managing, and supervising the work involved. To determine whether an MBE or WBE is performing a commercially useful function, the amount of work subcontracted, industry practices, and other relevant factors shall be evaluated.

12A:11-1.4 Certification procedures for minority businesses and women businesses

(a) Any business which seeks to be certified under the Act as a minority business and/or women business must apply to the Contracting Opportunity and Certification Office of the [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission**. For this purpose, the [Department] **Commission** shall prepare a New Jersey Uniform Certification Application. This form shall be available from the [Department] **Commission**, and other agencies and departments of the State which maintain programs which require certification of minority and women businesses.

(b) As part of its application to the [Department] **Commission** a business shall provide all required information and documents requested by the Uniform Certification Application and any additional information requested by the Contracting Opportunity and Certification Office. The information to be submitted for review shall include:

1-15. No Change

(c)-(f) No Change

#### 12A:11-1.5 Acceptance as a certified minority business or women business

(a) When a business is determined by the Contracting Opportunity and Certification Office to be a minority and/or women business, the business will be added by the [Department] **Commission** to the electronic database. The businesses on this database shall be eligible for all appropriate State programs which require certification as a criteria for participation in a specific program. There shall be no limit to the number of businesses on the database. Each business shall be placed on the database denoting its status as minority and/or women business enterprise.

(b)-(c) No Change

#### 12A:11-1.8 Denial of certification as a minority or women business

(a) No Change

(b) A business that is denied certification shall have 10 days from the date of notification of the denial to request a hearing with the Contracting Opportunity

and Certification Administrator for his or her or its first level appeal. The Contracting Opportunity and Certification Office shall notify the applicant of the time and place of the hearing and of the right of the applicant to attend and be represented at the hearing. The hearing shall be conducted by the Administrator. The burden of proof of eligibility lies with the applicant. The applicant may appeal the decision of the Administrator by requesting in writing to the Office of the [Commissioner] **Secretary** of the [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission** a final appeal within 15 days from receipt of the initial appeal decision. The letter shall include all information available relevant to the appeal. The applicant will be informed of a date, time, and place and circumstances upon which the applicant may appear personally before the [Commissioner] **Secretary** or his or her designee. The applicant may accept or reject the opportunity to personally appear at this hearing before a decision statement is issued.

(c) No Change

(d) An applicant who receives a decision from the Office of the [Commissioner] **Secretary** that the denial has been reaffirmed may reapply one year after the original date of denial.

12A:11-1.9 Procedure for challenging a business certified as a minority business

and/or women business

(a) The qualifications under these rules of a business on the electronic database may be challenged by any other business on the State bidders list or the State set-aside bidders list, and any State department or agency. The [Commissioner] **Secretary** shall have the discretion to dismiss a challenge for insufficient evidence.

1. A certification challenge shall be made in writing to the [Department] **Commission**, with copies to the challenged business and to the appropriate contracting agency where a specific contract is at issue.

2. A certification challenge to the [Department] **Commission** must be concerned with the authenticity of a business under these rules as a minority business or women business enterprise. Challenges of any other kind must be directed to the State department or agency which requires those other qualifications.

3. No Change

(b) In the case of a challenge to a certified minority or women business enterprise, the State agency or department making a contract award under a specific program shall be notified within three days of receipt of a challenge and shall immediately suspend any further awards under the contract for a period not



to exceed 20 days so the [Department] **Commission** may conduct a hearing, if warranted.

1. In the event that a currently certified minority and/or women business is unsuccessfully challenged under these rules by the [Department] **Commission**, the State agency or department shall proceed to award the contract as otherwise authorized by State statute.

2. In the event that a currently certified minority and/or women business is not disqualified by the [Department] **Commission** within 20 days, any contract awards suspended at the time due to the challenge shall be allowed to be awarded without prejudice.

### 3. No Change

(c) When the [Department] **Commission** receives a challenge, upon the request of the business whose certification is at issue, the [Department] **Commission** shall conduct a hearing on the matter as follows. The business must request the hearing within five days of the suspension of a contract award or in the case when no contract award is involved, within five days from receipt of notice that the business is subject to a challenge proceeding.

1. The [Department] **Commission** shall notify all interested parties of the time and place of the hearing, and of the right to attend and be represented at the

hearing.

2. The burden of proof lies with the challenger. However, the [Department] **Commission** may use its own resources to ascertain the viability of a challenge and the status of a business.

3. The hearing will be conducted by the designee of the [Commissioner] **Secretary**. This designee shall issue a written report to the [Commissioner of the Department] **Secretary of the Commission** within five days of the close of the hearing.

4. No Change

5. Thereafter, the [Commissioner] **Secretary** shall issue a final decision on the challenge and notify the parties by certified letter.

6. No Change

12A:11-1.10 Obligations to provide information and penalties for failure to provide complete and accurate information

(a) Applicants for certification under these rules shall accurately and honestly supply all information required by the [Department] **Commission**.

(b) When a business has been certified as a minority and/or women business on the basis of false information knowingly supplied, the [Commissioner of the Department] **Secretary of the Commission**, after notice and opportunity for a contested case hearing pursuant to N.J.S.A. 52:14B-10 and N.J.A.C. 1:1-1.1 et seq., may:

1. No Change

2. No Change

(c) Any business certified by the [Department] **Commission** as a minority and/or women business shall immediately apprise the [Department] **Commission** of any circumstances which in any way affect the ownership composition of the business, or the control over the business.

(d) No Change

#### 12A:11-1.11 Period and terms of certification

(a) A business once duly certified by the Contracting Opportunity and Certification Office shall not be required to submit a Uniform Certification Application for a period of [five] **three** years after the effective date of the certification, providing that the firm:

1-2 No change

(b) No Change

#### 12A:11-1.13 Certification reciprocity

(a) The [Commissioner] **Secretary** may form reciprocal agreements with or accept certifications by other public and private certifying entities as he or she deems appropriate to facilitate minority and women business development and growth.

(b) All reciprocal agreements must provide that:

1. The quality of the program of the other certifying agency is the relative equal of the [Department's] **Commission's** program; and

2. The [Department] **Commission** shall have the right to review all relevant information possessed by the other public or private entity pertaining to the certification of any business seeking to be certified by the [Department] **Commission**.

#### 12A:11-1.14 Information confidentiality

(a) All information and documents submitted to the [Department] **Commission** as part of the certification application shall be **deemed** confidential and [used only for purposes of determining certification] **not subject to disclosure**, unless **required or allowed by applicable federal and state law**. [except that information provided for the electronic database.] **Information provided for disclosure on the Commissions electronic database is not deemed confidential.**

(b)-(d) No Change